Yong Fuat Meng v Chin Yoon Kew

HIGH COURT (SIBU) — DIVORCE PETITION NO 33–16 OF 2007
HAMID SULTAN JC
25 JUNE 2008

Family Law — Divorce — Conversion to Islam — Conversion of one party in civil marriage to Islam — Whether civil court had jurisdiction to decide on dissolution of marriage — Law Reform (Marriage and Divorce) Act 1976 ss 3, 51 — Islamic Family Law Ordinance 2001 (Sarawak) s 44

The marriage between the petitioner and the respondent was solemnised under the civil law. Nearly twenty years after the solemnisation of his marriage the petitioner embraced Islam. Thereafter the petitioner filed this divorce petition against the respondent. However, s 51 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') provides that when one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce. In this case the problem was that the petitioner who had converted had filed the petition. In addition s 44 of the Islamic Family Law Ordinance 2001, Sarawak ('IFLO 2001') provides that the 'conversion to Islam by either party to a non-Muslim marriage shall not by itself operate to dissolve the marriage unless and until so confirmed by the court'. There therefore arose the issue as to whether the civil court has the jurisdiction to entertain this divorce petition. It was the petitioner's contention that the petitioner's act of conversion did not have the effect of taking away the jurisdiction of the civil court and that when a petition for divorce had been filed by a party who had converted to Islam, the High Court had the exclusive jurisdiction to decide on the matter and to grant the dissolution of the marriage. The respondent submitted that it was the intention of Parliament by art 121(1A) of the Federal Constitution to take away the jurisdiction of the High Courts in any matter within the jurisdiction of the Shariah Court. Moreover, the respondent submitted that when s 3 and s 51 of the Act are read together it is clear that the Act does not apply to a Muslim.

Held:

According to art 121(1A) of the Federal Constitution ('Constitution'), the Shariah Court has absolute jurisdiction to hear disputes relating to Islamic law or the personal law between born Muslims. However, in matters relating to converts and third parties affected by such conversions, the civil court may

have jurisdiction as such matters are not specifically prohibited by art 121(1A) of the Constitution. Therefore, since the petitioner in this case was not a born Muslim there was no prohibition for the petitioner to appear before the civil court to settle his obligations or liabilities that he himself had previously subscribed to by contracting a civil marriage under the Act (see para 16).

[Bahasa Malaysia summary

Perkahwinan di antara pempetisyen dan responden telah dilangsungkan di bawah undang-undang sivil. Hampir 20 tahun selepas berlangsungnya perkahwinan tersebut pempetisyen telah memeluk Islam. Kemudian, pempetisyen telah memfailkan petisyen perceraian ini terhadap responden. Walau bagaimanapun, s 51 Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta tersebut') memperuntukkan bahawa apabila satu pihak dalam perkahwinan telah memeluk Islam, pihak satu lagi yang tidak memeluk Islam boleh membuat petisyen untuk perceraian. Dalam kes ini, masalahnya adalah pempetisyen yang memeluk Islam yang memfailkan petisyen tersebut. Selanjutnya, s 44 Ordinan Undang-Undang Keluarga Islam (Sarawak) 2001 ('OUUKIS 2001') memperuntukkan bahawa 'pertukaran agama kepada Islam oleh mana-mana pihak kepada perkahwinan bukan Islam tidak secara sendirinya membubarkan perkahwinan melainkan dan sehingga disahkan oleh mahkamah'. Oleh itu timbullah isu sama ada mahkamah sivil mempunyai bidang kuasa untuk melayan petisyen perceraian ini. Adalah penegasan pempetisyen bahawa tindakan pempetisyen memeluk Islam tidak memberikan kesan penafian bidang kuasa mahkamah sivil dan apabila petisyen perceraian telah difailkan oleh pihak yang telah memeluk Islam, Mahkamah Tinggi mempunyai bidang kuasa eksklusif untuk memutuskan dan membenarkan pembubaran perkahwinan tersebut. Responden menghujahkan bahawa adalah niat Parlimen melalui perkara 121(1A) Perlembagaan Persekutuan untuk mengeluarkan bidang kuasa Mahkamah Tinggi dalam mana-mana perkara di dalam bidang kuasa Mahkamah Syariah. Selanjutnya, responden menghujahkan bahawa apabila ss 3 dan 51 dibaca bersama adalah jelas bahawa Akta tersebut tidak terpakai kepada orang Islam.

Diputuskan:

Menurut perkara 121(1A) Perlembagaan Persekutuan ('Perlembagaan'), Mahkamah Syariah mempunyai bidang kuasa mutlak untuk mendengar pertikaian yang berkaitan dengan perundangan Islam atau undang-undang diri di kalangan mereka yang dilahirkan Islam. Walau bagaimanapun, dalam perkara yang berkaitan dengan orang yang memeluk Islam dan pihak ketiga yang terlibat dengan penukaran agama tersebut, mahkamah sivil mempunyai

bidang kuasa yang mana perkara tersebut tidak dihalang secara spesifik oleh perkara 121(1A) Perlembagaan. Oleh itu, disebabkan pempetisyen dalam kes ini tidak dilahirkan Islam oleh itu tiadanya halangan bagi pempetisyen untuk hadir di hadapan mahkamah sivil untuk menyelesaikan kewajipan atau liabilitinya yang mana sebelum itu berpegang kepada perkahwinan yang diikat di bawah Akta tersebut (lihat perenggan 16).]

Notes

For cases on divorce generally, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3065–3310.

Cases referred to

Azizah bte Shaik Ismail & Anor v Fatimah bte Shaik Ismail & Anor [2004] 2 MLJ 529 (refd)

Che Omar bin Che Soh v PP [1988] 2 MLJ 55 (refd)

Commissioner for Religious Affairs, Terengganu & Ors v Tengku Mariam bte Tengku Sri Wa Raja & Anor [1970] 1 MLJ 222 (refd)

Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor [1992] 1 MLJ 1 (refd)

Faridah Begum bte Abdullah v Sultan Haji Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri'ayatuddin Al Mu'adzam Shah [1996] 1 MLJ 617 (refd)

Kamariah bte Ali & lain-lain lwn Kerajaan Negeri Kelantan & satu lagi [2005] 1 MLJ 197 (refd)

Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor [2007] 5 MLJ 101 (refd)

Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan & lain-lain [2007] 4 MLJ 585 (refd)

Majlis Agama Islam Pulau Pinang lwn Isa Abdul Rahman & satu yang lain [1992] 2 MLJ 244 (refd)

Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors [2003] 3 MLJ 705 (refd)

Malayan Banking Bhd v Ya'akup bin Oje & Anor [2007] 6 MLJ 389 (refd)

Meor Atiqulrahman bin Ishak (an infant, by his guardian ad litem, Syed Ahmad Johari bin Syed Mohd) & Ors v Fatimah bte Sihi & Ors [2006] 4 MLJ 605 (refd)

Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib [1992] 2 MLJ 793 (refd)

Ng Siew Pian lwn Abd Wahid bin Abu Hassan, Kadi Daerah Bukit Mertajam & satu yang lain [1992] 2 MLJ 425 (refd)

Nordin bin SalIeh v Kerajaan Negeri Kelantan & Anor [1993] 3 MLJ 344 (refd)

Ramah bte Ta'at v Laton bte Malim Sutan [1927] 6 FMSLR 128 (refd)

Shamala a/p Sathiyaseelan v Dr Jeyaganesh a/l C Mogarajah [2004] 2 MLJ 241 (refd)

A *Sia Kwee Hin v Jabatan Agama Islam Wilayah Persekutuan* [1999] 1 MLJ 504 (refd)

Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor [1999] 1 MLJ 489 (refd)

B *Subashini a/p Rajasingam v Saravanan a/l Thangathoray and other appeals* [2008] 2 MLJ 147 (refd)

Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor [1999] 2 MLJ 241 (refd)

Sultan of Johore v Abu Bakar Tunku Aris Bendahara & Ors [1952] AC 318 C (refd)

Tang Sung Mooi (f) v Too Miew Kim [1994] 3 MLJ 117 (refd)

Tey Siew Choo @ Nur Aishah Tey bte Abdullah v Teo Eng Hua [1999] 3 AMR 2279 (refd)

D **Legislation referred to**

Federal Constitution arts 3, 11, 11(1), 11(3), 121(1A), Schedule 9
Islamic Family Law Ordinance 2001 (Sarawak) ss 2, 44, 44(2), 139
Law Reform (Marriage and Divorce) Act 1976 ss 3, 3(3), 51

E *Louis Jarau (Gapor & Co Advocates) for the petitioner.*
Saferi bin Ali (State Legal Officer State Attorney General's Chambers) for the respondent.

Hamid Sultan JC:

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[1] This is my judgment in respect of the issue of jurisdiction to hear the petition filed by the petitioner who has embraced Islam nearly 20 years after the solemnisation of his marriage under the civil law. The respondent (wife) G is still a non-Muslim.

[2] The real issue before deciding the petition and granting the relief is to decide whether the civil court has jurisdiction in light of s 51 of the Law Reform (Marriage and Divorce) Act 1976 ('LRA 1976'), which says that H when one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce. The section reads as follows:

(1) Where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce: I

Provided that no petition under this section shall be presented before the expiration of the period of three months from the date of the conversion.

(2) The Court upon dissolving the marriage may make provision for the

wife or husband, and for the support, care and custody of the children of the marriage, if any, and may attach any conditions to the decree of the dissolution as it thinks fit.

(3) Section 50 shall not apply to any petition for divorce under this section.

In this case, the problem is that the petitioner who had converted has filed the petition, which will appear to be non permissible under the above section and/or s 3 of the said LRA 1976.

[3] The second issue is whether the civil court has jurisdiction to entertain the petition when s 44 of the Islamic Family Law Ordinance 2001 (Sarawak) ('IFLO 2001') states:

(1) The renunciation of Islam by either party to a marriage or his or her conversion to a faith other than Islam shall not by itself operate to dissolve the marriage unless and until so confirmed by the court.

(2) The conversion to Islam by either party to a non-Muslim marriage shall not by itself operate to dissolve the marriage unless and until so confirmed by the court.

(Similar provisions are found in other states, Family Law Ordinance and court here means Shariah Court).

PRELIMINARIES

[4] There are a number of decisions of the civil court which has dealt with the issue of jurisdiction in relation to conversion in the area of marriage, apostasy, death etc; some of them are as follows: (1) *Tang Sung Mooi (f) v Too Miew Kim* [1994] 3 MLJ 117 (Supreme Court), (2) *Subashini a/p Rajasingam v Saravanan a/l Thangathoray and other appeals* [2008] 2 MLJ 147 (Federal Court), (3) *Dalip Kaur v Pegawal Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1 (Supreme Court), (4) *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489 (Federal Court), (5) *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & lain-lain* [2007] 4 MLJ 585 (Federal Court), (6) *Kamariah bte Ali & lain-lain v Kerajaan Negeri Kelantan & satu lagi* [2005] 1 MLJ 197 (Federal Court), (7) *Sia Kwee Hin v Jabatan Agama Islam Wilayah Persekutuan* [1999] 1 MLJ 504 (Federal Court), (8) *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793 (Supreme Court), (9) *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors* [2003] 3 MLJ 705 (Federal Court), (10) *Faridah Begum bte Abdullah v Sultan Haji Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri'ayatuddin Al Mu'adzam Shah* [1996] 1 MLJ 617 (Special

Court), (11) *Sultan of Johore v Abu Bakar Tunku Aris Bendahara & Ors* [1952] AC 318 (Privy Council), (12) *Meor Atiqulrahman bin Ishak (an infant, by his guardian ad litem, Syed Ahmad Johari bin Syed Mohd) & Ors v Fatimah bte Sihi & Ors* [2006] 4 MLJ 605 (Federal Court), (13) *Ramah bte Ta'at v Laton bte Malim Sutan* [1927] 6 FMSLR 128 (Supreme Court), (14) *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55 (Supreme Court), (15) *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor* [1999] 2 MLJ 241 (Federal Court), (16) *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101 (Federal Court), (17) *Commissioner For Religious Affairs, Terengganu & Ors v Tengku Mariam bte Tengku Sri Wa Raja & Anor* [1970] 1 MLJ 222 (Federal Court),(18) *Majlis Agama Islam Pulau Pinang v Isa Abdul Rahman & satu lagi* [1992] 2 MLJ 244 (Supreme Court), (19) *Nordin bin SalIeh v Kerajaan Negeri Kelantan & Anor* [1993] 3 MLJ 344 (Supreme Court), (20) *Azizah bte Shaik Ismail & Anor v Fatimah bte Shaik Ismail & Anor* [2004] 2 MLJ 529 (Federal Court).

I have read the said judgments. I have also gone through standard text books of eminent scholars in Islamic Jurisprudence while writing this judgment, in particular; (i) Mahmassani, S [1987] *The Philosophy of Jurisprudence in Islam,* translated by Farhat J Ziadeh Malaysia: Penerbitan Hizbi; (ii) Coulson, NJ [1964] *A History of Islamic law,* Edinburgh University Press; (iii) Anderson, N [1976] *Law Reform in the Muslim World*, Great Britain: The Athlone Press; (vi) Hameedullah Khan, Mohammad [1991] *The Schools of Islamic Jurisprudence,* New Delhi: Kitab Bhavan; (v) Rahim, A [1992] *Islamic History,* Delhi: Royal Publishers & Distributors; (vi) Hamilton, C [1994] *The Hedaya,* Reprint, Delhi: Kitab Bhavan; (vii) Qadri, AA [1986] *Islamic Jurisprudence in the Modern World,* Delhi: Tas Company. The difficulty in issues relating to jurisdiction has also been highlighted by the present Chief Justice, YAA Tun Abdul Hamid Mohamad in *Ng Siew Pian lwn Abd Wahid bin Abu Hassan, Kadi Daerah Bukit Mertajam & satu yang lain* [1992] 2 MLJ 425 and *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101).

[5] In view of art 121(1A) of the Federal Constitution, I have no hesitation to say here that Shariah Court has absolute jurisdiction, when the dispute is between born Muslims, to hear any dispute relating to Islamic law or the personal law of Muslims, as enunciated in para 1 of list 2, Schedule 9 of the Federal Constitution ('Schedule 9'); and which has been enacted by the State Legislature and is not contrary to Islamic law or personal law of Muslims (see s 139 of the IFLO 2001). As to other matters, inclusive of matters relating to conversion, the civil courts may have jurisdiction, and it all depends on the facts of the case. Further, it must be emphasised here that neither the Shariah Court nor the civil court is the supreme decision maker on issues relating to Islam as the Federal Constitution has empowered HRH the Rulers, I will say

as the last bastion, to consider the problem, asses the consequence, evaluate alternative, and need be advance the remedy.

Further, I will state that the Federal Constitution gives ample power to HRH the Rulers, to exercise equity in the best interest of the nation and make decision on case by case basis, whether the matter involves petty issues such as change of name or major issues like conversion to Islam or diversion from Islam. And in all matters, because of the dominant provision in the Federal Constitution which prohibits State Legislature from enacting any provision contrary to Islamic law or personal laws of Muslim which I shall deal with shortly. Because, equity in Islam is a sacrosanct command of Allah and I have dealt with it in some detail in the case of *Malayan Banking Bhd v Ya'akup bin Oje & Anor* [2007] 6 MLJ 389. In crux, equity in Islam plays a significantly important role in the administration of Justice, than the common law. In England one may say, 'where the law fails equity may save'. However, pursuant to various Quranic injunctions, it can be safely said in Islam, 'equity is the fulcrum of justice'. Support for my proposition is found in a number of Quranic commands. I have dealt with it to some extent in *Malayan Banking Bhd* the relevant part of which reads as follows:

> Central to the concept of Islam is Justice. All transactions whether it is judicial, political, commercial or private etc. are subject to this concept. In the Qur'an, (*al-Hijr*: 85) states that:
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> > We created not the heavens, the earth, and all between them, But for just ends. And the Hour is surely Coming (when this will be manifest). So overlook (any human faults) With gracious forgiveness.
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> This concept has been emphasised in various places in the Holy Qur'an, [see the Qur'an (*al-Maidah*: 8); Qur'an (*an-Nisaa*: 20 135); Qur'an (*ad-Dukhan*: 38-39); Qur'an (*an-Nisaa*: 58) and Qur'an (*an-Nisaa*: 105); Qur'an (*al-Baqarah*: 213); Qur'an (*as-Shura*: 15); Qur'an (*an-Nisaa*: 107); Qur'an (*Sad*: 26); Qur'an (*al-Hadid*: 25)]. In Islam, man is seen to be the servant (abd) and vicegerent of Almighty. He has specific duties and obligations to perform in relation to Allah, to himself, to nature, to the religion, to his relatives and to the community. Islamic ethos demands that a Muslim abides by the messages of the Holy Qur'an, follow the Sunnah of the Prophet (PBUH) and accept the rulings of recognised religious scholars of the past. A Muslim is imposed with a greater duty and responsibility and must abide by this ethos to achieve fallah (success). Justice in Islam is part of Allah's attribute and to stand firm for it is to be a witness to Allah, [see the Qur'an (*an-Nisaa*: 135)]. In the Qur'an, (*al-Maidah*:8) it is asserted that: ...
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> Learned author, Ahmad Qadri (1982) aptly summarises the concept of justice by stating that justice in Islam is much higher than the so called distributive and remedial justice of Aristotle, the natural justice of the Anglo-American Common Law, the formal justice of the Roman Law, or any other man-made law. Moreover, he says that it searches out the innermost motives of man, because he has to act as in the presence of God, to Whom all things, acts, and motives are known. It is trite

A that Islam is against all kinds of injustices and warns the wrongdoers. Support for this proposition can be found in many of the verses in the Holy Qur'an ...

The founding fathers of our Federal Constitution have entrusted with full wisdom the full scope of equity with HRH the Rulers. Besides, the
B empowerment in relation to Islam is consonant with the Quranic injunctions, in particular, the Quran (*al-Nisaa*:59) which states:

O ye who believe! Obey Allah, and obey the Messenger, and those charged with authority among you. If ye differ in anything, among yourselves, refer it to Allah and His Messenger, If ye do not believe in Allah, and the Last Day: That is best,
C and most suitable for final determinations.

[6] After having read the above cited judgments, and the manner the provisions of the law and constitution were interpreted, I take the view that
D the common law methodology of interpretation of statutes or constitution which was applied in those cases do not cater for interpretation of constitution or statutes when religious principles or doctrines or concepts etc, become the subject matter of the decision. Further, civil court has also not considered the issue as to whether art 121(1A) can be strictly applied to only
E persons who are born Muslim and litigation relating to born Muslims; and whether there is an exception when it relates to converts and disputes entangled with non-Muslims as a result of conversion. This is in spite of the fact that, in the judgments of the civil court, it is clear that when it involves dispute relating to converts and non-Muslims, the civil court has entertained
F the application and/or have stated that the application can be entertained. When the Federal Constitution states Islam is the religion of the Federation, failure to take into consideration Islamic principles and laws when interpreting statutes or constitutions in matters relating to the religion of Islam is likely to create confusion, criticism and hardship to the public.

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[7] I will explain this further in my judgment, but for a start in relation to this case, I can safely say that it is common knowledge under the personal law of a Muslim, as enunciated by the Holy Qur'an, (*al-Mumtahana*:10), that once a person embraces Islam his or her previous marriage to a non-Muslim
H immediately dissolves. There are no requirements under the Islamic law or personal law of a Muslim to seek a declaration from the Shariah Court and that is protected and fortified by arts 3 and 11 and Schedule 9 of the Federal Constitution.

I **[8]** In contrast to the explicit Quranic injunction s 44(2) of the IFLO 2001, and it's like in other states, the ordinance says it must be confirmed by the Shariah Court. Prima facie this section and I observe many other sections in the state ordinance of various states, inclusive of that which relates to administrative procedures, consents etc and penal provision for failing to

comply with such provisions cannot be truly said to be Islamic law or personal law of the Muslims. In consequence, it is an infringement of constitutional rights of Muslims as protected under the above said article. However, to be fair to the State Legislatures, they have foreseen the possibility of such errors and to overcome this fundamental problem, they have enacted specific provision to address this problem. In Sarawak, it is found in s 139 of the IFLO 2001 which reads as follows:

(1) Any provision or the interpretation of any provision in this ordinance which is inconsistent with Islamic Law shall, to the extent of such inconsistency, be void.

(2) If the event of a lacuna or where there is any matter which is not expressly provided for in this ordinance or in any rules made under this ordinance, the shariah court shall refer to Islamic Law.

[9] Similar provisions are found in other states in their state ordinance. However, our courts in deliberating *equipollent* section, like s 44(2) of the IFLO 2001 in various state ordinance have only interpreted the cold letters of the statute without giving full recognition to the Quranic injunctions and the provisions of the Federal Constitution, although Islam is the religion of the Federation and all Muslims are entitled to practice their faith according to Islamic law and the personal law of the Muslims; and to assert that in the instance of a Muslim having embraced Islam, it is not necessary under the personal law of the Muslim to seek dissolution of his or her marriage in the Shariah Court; to that extent that section is void, or superfluous in line with such provision like s 139 of the IFLO 2001. In light of art 3 and in interpreting statutes, failure to exercise Islamic Jurisprudence promptly has caused much confusion. Therefore, it has become necessary for me in consequence of judicial precedent to deal with the cases and reason out my judgment on the issue of jurisdiction. This has also become no easy task, and, in consequence, I am grateful to En Saferi bin Ali from the State Attorney General's Chambers for having assisted this court. I also benefited from the opinion of learned counsel Dr Mohd Rafie bin Mohd Shafie, a well-known senior practitioner of the Malaysian Bar who has carved a name and niche for himself in Shariah practice and on whose opinion, the petitioner's counsel has relied on in full. I am also grateful to learned counsel En Hanif Khatri, a well-known practitioner of the Malaysian Bar who has appeared in the Federal Court in some related cases in this area of law. He has given me all relevant case authorities dealing with this issue.

THE PETITIONER'S SUBMISSIONS

[10] As I had mentioned earlier, the petitioner has relied heavily on the opinion of learned counsel Dr Mohd Rafie. The petitioner's submission can be summarised as follows:

A I wish not to elaborate further on the history of the laws that governed the Civil and Shariah Courts in this country and their respective jurisdiction. I wish to submit that the law on the issues of jurisdiction before us has been settled in the case of *Subashini a/p Rajasingam v Saravanan a/l Thangathoray and other appeals* [2008] 2 MLJ 147.

B In the above mentioned case, Nik Hashim FCJ in delivering the majority judgment of the court said '... by contracting the civil marriage, the husband and wife were bound by the 1976 Act in respect to divorce and custody of the children of the marriage, and thus, the civil court continues to have jurisdiction over him, notwithstanding his conversion to Islam'.

C The above statement clearly shows that the civil courts has the jurisdiction to decide on cases in which a petitioner regardless whether he is a convert or not, filed for divorce under the 1976 Act. In the case before us, since the marriage was registered under a civil marriage and governed by the 1976 Act this honourable court therefore has the jurisdiction to hear the petition.

D Nik Hashim FCJ in his judgment also stated that the status of the parties at the time of the marriage is the material consideration for the purpose of determining the question of jurisdiction. He had also earlier stated that the High Court (in *Subashini*'s case) had exercised its civil jurisdiction with regard to the matter under s 24(a) of the Courts of Judicature Act 1964 which states that the E jurisdiction of the High Court shall include the jurisdiction under any written law relating to divorce and matrimonial causes. The phrase 'any written law relating to divorce and matrimonial causes' must include the 1976 Act.

Section 24 of the Courts of Judicature Act 1964 states the specific civil jurisdiction of the High Court. It is clear therefore that since the petitioner and respondent F were lawfully married under civil law, they must submit to the requirements of the same law when they wish to dissolve their marriage.

The petitioner and respondent must also adhere to the civil law on maintenance and custody of the children from the said marriage.

G The petitioner, whose Muslim name is Mohammad Syafirul Amri Abdullah would not succeed in the Shariah Court to dissolve his marriage as the respondent, who is a non-Muslim, had no locus in the Shariah Court.

Therefore the petitioner has come to the right court in applying for his marriage to be dissolved.

H Abdul Aziz Mohammad FCJ in para 147 p 88 in his judgment stated 'The dissolution of the marriage in this case, which is a non-Muslim marriage, and matters consequential or ancillary thereto, including maintenance, custody of children and other ancillary reliefs, are not matters within the jurisdiction of the Shariah Courts. Therefore cl (1A) of art 121 does not apply to deprive the High I court of its Jurisdiction under s 51 of the Law Reform Act. The High Court has the exclusive jurisdiction.

My Lord, though *Subashini*'s case was regarding s 51 of the Law Reform (Marriage and Divorce) Act 1976, it does not mean that the decision of the Federal Court on the issue of jurisdiction could not be applied in the case before us.

I humbly submit that the decision on jurisdiction in *Subashini*'s case can be applied by this honourable court in the case filed by the petitioner herein.

As it is My Lord, from the case of *Subashini* we can clearly be sure that in matters where a petition for divorce has been filed by a party who has converted to Islam, the High Court has the exclusive jurisdiction to decide on the matter and to grant the dissolution of marriage. It has also the exclusive jurisdiction to decide on the order for maintenance, custody of children and other relief that the party to the proceeding has brought up during the hearing of the petition.

My Lord, I have had the opportunity to seek the opinion of Dr Mohd Rafie bin Mohd Shafie, who is a renown Shariah legal practitioner from the Malaysian Bar.

It is in the considered opinion of Dr Rafie that the civil court has jurisdiction to hear the petition to dissolve the civil marriage of the petitioner under the Law Reform (Marriage and Divorce) Act 1976 irrespective of the petitioner conversion to Islam after filing the said petition.

According to Dr Rafie, the petitioner's act of conversion does not have the effect of taking away the jurisdiction of the Civil Court.

He further added that the respondent is not prejudiced by the petitioner's petition and subsequent conversion to Islam as the parties are no more together. In fact the respondent will be prejudiced if the court were to rule that the court has no jurisdiction.

A non-Muslim marriage does not automatically dissolve upon one of the parties converting to Islam, therefore by contracting the civil marriage the petitioner and respondent were bound by the Law Reform (Marriage and Divorce) Act 1976 in respect of divorce, maintenance and custody of the children of the marriage and thus the civil court continues to have jurisdiction.

Dr Rafie in his opinion also stated that O 92 r 4 of the Rules of the High Court 1980, provided that the courts have inherent powers to make orders to prevent injustice to parties.

Based on the above arguments and opinions it is humbly submitted that the civil High Court has jurisdiction to dissolve the petitioner marriage which was contracted when both parties were non-Muslim under the Law Reform (Marriage and Divorce) Act 1976.

I therefore humbly pray that the said marriage between the petitioner and the respondent be dissolved and also for an order in terms for the prayers stated in the petition dated 12 February 2007.

STATE ATTORNEY GENERAL'S CHAMBERS

[11] The submission of En Saferi bin Ali, inter alia, can be summarised as follows:

(a) It is the intention of Parliament by art 121(1A) of the Federal Constitution to take away the jurisdiction of the High Courts in respect

of any matter within the jurisdiction of the Shariah Court, (see Supreme Court decision on *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793)

(b) Nevertheless, the issue on the conflict of jurisdiction of the civil court as against the Shariah Court has always come to the forefront. As Abdul Hamid Mohamad, FCJ in a recent case of *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101 pointed out at p 108 that:

> The problem has arisen and has become more serious over the last two decades. Courts, the civil courts as well as Shariah Courts have had to grapple with this problem. While a judgment settles the case before the court, it creates other problems in subsequent cases.

The court at pp 116–117 further observed:

> The point to note here is that both courts, civil and Shariah, are creatures of statutes. Both owe their existence to statutes, the Federal Constitution, the Acts of Parliament and the State Enactments. Both get their jurisdictions from statues ie, Constitutions federal law or state law, as the case may be. So, it is to the relevant statutes that they should look to determine whether they have jurisdiction or not. Even if the Shariah Court does not exist, the civil court will still have to look at the statutes to see whether it has jurisdiction over a matter or not. Similarly, even if the civil court does not exist, the Shariah Court will still have to look at the statute to see whether it has jurisdiction over a matter or not. Each court must determine for itself first whether it has jurisdiction over a particular matter in the first place, in the case of the Shariah Courts in the States, by referring to the relevant State laws and in the case of the Shariah Court in the Federal Territory, the relevant Federal laws. Just because the other court does not have jurisdiction over a matter does not mean that it has jurisdiction over it. So, to take the example given earlier, if one of the parties is a non-Muslim, the Shariah Court does not have jurisdiction over the case, even if the subject matter falls within its jurisdiction. On the other hand, just because one of the parties is a non-Muslim does not mean that the civil court has jurisdiction over the case if the subject is not within its jurisdiction.

(c) Section 3 and 3(3) of the LRA 1976 states:

> This Act shall not apply to a Muslim or to any person who is married under Islamic law and no marriage of one of the parties which professes the religion of Islam shall be solemnized or registered under this Act; but nothing herein shall be construed to prevent a court before which a petition for divorce has been made under section 51 from granting a decree of divorce on the petition of one party to a marriage where the other party has converted to Islam, and such decree

> shall, notwithstanding any other written law to the contrary, be valid against the party to the marriage who has so converted to Islam.

When the above provision is read with s 51 of the LRA 1976, the said Act LRA 1976 does not apply to a Muslim.

(d) The Federal Court in a majority decision, delivered by Nik Hashim FCJ, inter alia, held that:

> Assuming that the wife's petition was properly before the court ie it was filed three months after the conversion, then my view is that the High Court would have the jurisdiction to hear and determine the petition for divorce and the application for ancillary reliefs under s 51 of the 1976 Act even though the husband had converted to Islam before her petition for divorce had been filed in the High Court and that he had already commenced the proceedings in the Shariah Court.

The court further held:

> I agree with learned counsel for the wife that the status of the parties at the time of the marriage is the material consideration for the purpose of determining the question of jurisdiction. In *Kamariah bte Ali & lain-lain v Kerajaan Negeri Kelantan & satu lagi* [2005] 1 MLJ 197, the appellants claimed by a statutory declaration that they were no longer Muslims in August 1998. They were sentenced to imprisonment on 5 October 2000 for failure to abide by the order of the Shariah Court of Appeal relating to the offence under Undang-Undang Majlis Agama Islam dan Adat Istiadat Melayu Kelantan which they had committed before August 1998. The appellants contended that as they were no longer Muslims, the Shariah Court had no jurisdiction over them. Therefore, the issue was whether the appellants must be Muslims when they were sentenced in October 2000. In resolving the issue, the Federal Court (Ahmad Fairuz Chief Justice, Mohd Noor Ahmad, PS Gill Rahmah Hussain FCJJ and Richard Malanjum JCA (as he then was)) concluded that notwithstanding their claim to no longer being Muslims, the material time for determining the question of jurisdiction was the time when the offence were committed and at that time the appellants were Muslims.

At para 20 of his judgment (p 169), the court further declared that:

> But in the present case, the husband had converted to Islam and had filed the proceedings in the Shariah High Court for dissolution of the marriage and the custody of the converted son. By embracing Islam, the husband and the son became subject to Muslim personal and religious laws and it is not an abuse of process if he, being Muslim, seeks remedies in the Shariah High Court as it is his right to do so.

At para 22 (p 170), the court opined that:

A

> In the present case, there is no impediment for the converted spouse ie husband, to appear in the divorce proceeding in the High Court albeit as the respondent, as the jurisdiction of the High Court extends to him unlike the Shariah Court which restricts its jurisdiction to persons professing the religion of Islam only.

B

(e) It is therefore, in *Subashini*'s case, the wife (non-Muslim party) who applied to the High Court pursuant to s 51 of the 164 Act. The Federal Court held that it has jurisdiction to hear the case taking into account the fact that even assuming the wife's petition was

C

properly submitted before the court and the status of the parties at the time of the marriage was the material consideration for the purpose of determining the question of jurisdiction.

Hence, it is no doubt that the High Court has jurisdiction to

D

dissolve the marriage contracted under and by virtue of 164 Act above although the other party has converted to Islam, following the principles laid down in the Federal Court in *Subashini*'s case.

However, in the present case, it is the petitioner who is a Muslim,

E

and who has applied to this High Court pursuant to s 51 of the 164 Act. It is not the wife, who is the non-Muslim, who is the petitioner, as was in *Subashini*'s case. Thus, it would appear that the above principles should be distinguished from the present case.

As far as the case authorities are concerned, the facts are not similar

F

to the present case, where in this case, it is the petitioner, who is a Muslim, who had applied to the High Court by virtue of s 51 of the 164 Act to dissolve the marriage which was contracted in accordance with the said Act.

G

(f) At this juncture, I refer once again to the case of *Ng Siew Pian v Abd Wahid bin Abu Hassan, Kadi Daerah Bukit Mertajam & satu yang lain* [1992] 2 MLJ 425 which I had referred to earlier at para 4.1 (vi) (1) of my submission dated 9 June 2008. Perhaps it could be of assistance to this court, since at p 431, the court said:

H

> Sebaliknya, adakah Mahkamah Tinggi mempunyai bidang kuasa untuk membubarkan perkahwinan berkenaan jika permohonan dibuat di Mahkamah Tinggi?

I

Jawapannya terdapat dalam s 51 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976:

> 51(2) Where one party to a marriage has converted to Islam, the other who has not so converted may petition for divorce:

Provided that no petition under this section shall be presented before the expiration of the period of three months from the date of conversion.

> Perlu diambil perhatian bahawa seksyen ini membolehkan pihak yang tidak memeluk agama Islam membuat permohonan membatalkan perkahwinan itu. Seksyen ini nampaknya tidak memberi hak kepada pihak yang memeluk agama Islam untuk memohon.

The court further held:

> Walau bagimanapun, jika pihak yang tidak memeluk Islam memohon maka, Mahkamah Tinggi mempunyai bidang kuasa membicarakannya, walaupun pihak satu lagi beragama Islam, kerana bidang kuasa Mahkamah Tinggi meliputi semua orang, tidak kira apa agamanya atau tidak beragama langsung.

At p 432, Abdul Hamid J (as he then was) illustrated a circumstance where in the instance the non-converted does not apply to the High Court:

> Tetapi, bagaimana jika pihak yang tidak memeluk agama Islam tidak memohon, tetapi pihak yang memeluk agama Islam hendak memohon? Di mahkamah manakah ia hendak memohon? Dia tidak boleh memohon di Mahkamah Tinggi. Mahkamah Kadi pula tidak mempunyai bidang kuasa untuk membicarakan kes itu kerana satu pihak bukan beragama Islam. Di sini nampaknya terdapat satu 'lacuna' yang patutlah badan perundangan memberi perhatian dan membuat pindaan-pindaan yang perlu. Jika saya boleh mencadangkan, elok rasanya kuasa diberi kepada Mahkamah Tinggi untuk membubarkan perkahwinan seperti itu kerana perkahwinan itu bukan perkahwinan Islam, dan biasanya pun Mahkamah Tinggilah yang mempunyai kuasa membubarkan perkahwinan bukan Islam.

The above case had illustrated a situation where in the converted Muslim party applied to the High Court as the petitioner has in the present case, and the High Court had jurisdiction to hear the matter.

(g) Suriyadi b Halim Omar, J (as he then was) in *Tey Siew Choo @ Nur Aishah Tey binti Abdullah v Teo Eng Hua* [1999] 3 AMR 2279 observed the case before him and stated that:

> The legal point to be disposed by me, is whether the petitioner could petition for an order of divorce under the Law Reform (Marriage and Divorce) Act 1976 (Act 164), even though already converted to Islam. In Malaysia separate systems of family and personal law exist for Muslims and non-Muslims. Under item 4(e) in List I (Federal Legislative List) in the Ninth Schedule of the Federal Constitution, is provided therein the legislative jurisdiction of Parliament in respect of family law for

> non-Muslims. Parliament similarly has the authority to legislate on Islamic family law but confined to the Federal Territory. Without the necessity of having to delve in depth, suffice if I may say that Muslims are dealt with under the shariah law and the relevant Enactments of the respective States. A conflict of personal law may occasionally arise when one of the contending parties convert to Islam or even apostate, hence the matter at hand.

At the conclusion of his judgment and having regard to the facts of the case, the learned Judge held that a converted petitioner is equally entitled to petition for a divorce under the Act. However, it is to be noted that in that case, the dissolution of civil marriage was made pursuant to s 54(1)(d) of the Act, as adverted by the petitioner and which was not contested.

(h) In the case of *Shamala a/p Sathiyaseelan v Dr Jeyaganesh a/l C Mogarajah* [2004] 2 MLJ 241, Faiza Tambi Chick J (as he then was), was of the opinion that the civil court has jurisdiction to hear the case. The fact that the defendant's husband has converted to Islam does not change the status of their civil marriage. The defendant's husband's obligation under the Hindu marriage cannot be extinguished or avoided by his conversion to Islam.

However, considering ss 51 of the 164 Act (the Law Reform), the judge held that:

> Therefore, the defendant husband is regarded as having committed a matrimonial offence thereby enabling the plaintiff wife who has not so converted to petition for divorce. The effect of the law is that the defendant husband cannot obtain a divorce at all. The defendant husband cannot obtain a divorce under the Act as s 51 only gives right to apply for divorce to the party who has not converted to Islam, ie the plaintiff wife.

It is to be observed that in *Subashini*'s case (referred to in the earlier submission) the Federal Court asserted that:

> A non-Muslim marriage does not automatically dissolve upon one of the parties converted to Islam. Thus, by contracting the civil marriage, the husband and wife were bound by the 1976 Act in respect to divorce and custody of the children of the marriage, and thus, the civil court continues to have jurisdiction over him, notwithstanding his conversion to Islam.

On the dissolution order by the Shariah Court, the Federal Court opined:

> To my mind, the dissolution order of the civil marriage by the Shariah High Court by virtue of conversion would have no legal effect in the High Court other than as evidence of the fact of the dissolution of the marriage under the Islamic law in accordance with Hukum Syarak. Thus, the

non-Muslim marriage between the husband and wife remains intact and continues to subsist until the High Court dissolves it pursuant to a petition for divorce by the unconverted spouse under s 51(1) of the 1976 Act.

(i) If the court is to follow Abdul Hamid J (as he then was) in *Ng Siew Pian* which transpired on a situation similar to that of the petitioner in this case, then, the High Court has jurisdiction to dissolve the marriage. Or, if this court were to adopt *Tey Siew Choo @ Nur Aishah Tey binti Abdullah's* case but not on the grounds of conversion to Islam as provided in s 51, then, the marriage could be dissolved by this court on other grounds. It is to be noted that in *Subashini*'s case, the Federal Court has to answer the complaint by counsel for the husband on the constitutionality of s 51 where it was argued that it was unjust and ultra vires of art 8(1) of the Constitution and therefore void for it only allows the unconverted non-Muslim spouse to become the petitioner. At para 17 (p 167) the court held that s 51(1) does not violate art 8 of the FC therefore is not void as complained. The classification created by s 51(1) is a reasonable classification as the persons in the non-converting category are treated equally as are persons in the converting party.

Based on the above, the conclusion at 4.1 (iii) above, the Federal Court recognised the fact that there was a complaint on the equality where at the end of the day, the court was of the view that s 51(1) which only allows the non-converted party to petition is constitutional and not void.

(j) It is therefore our view that the High Court has jurisdiction to dissolve the marriage contracted under and by virtue of 164 Act, although the other party has converted to Islam, following the principles laid down in the Federal Court in *Subashini*'s case; provided that the application is made by the non-converted (non-Muslim party) as the existing law provides only to the non-Muslim party to apply under s 51 of the said Act. Further, as the Federal Court in *Subashini*'s has held that, there is no impediment for the converted spouse to appear in the divorce proceeding in the High Court albeit as the respondent, as the jurisdiction of the High Court extends to him unlike the Shariah Court which restricts its jurisdiction to persons professing the religion of Islam only. These chambers is also aware that there is still an attempt to amend s 51 of the 164 Act. However, the law, until it is amended, only gives the right to the non-converted party to apply for the dissolution of the marriage contracted under the said Act and not to the converted Muslim party. However, it is to be noted that, the Federal Court in *Subashini*'s case also clearly held that by embracing Islam, one is subject to Muslim

personal and religious laws and it is not an abuse of the process if he, being Muslim, seeks remedies in the Shariah High Court as it is his right to do so.

Question by court

(k) Can the Shariah legislation regulate the practice of Islam when under the personal law, once the person converts, it automatically dissolved the marriage. In that sense, is s 44(2) ultra vires the personal law of Islam or the Federal Constitution?

Answer

(1) From the Islamic law perspective, if a married man embraces Islam but his wife fails to convert to Islam, the marriage in question ceases to subsist on the date of the husband's conversion. In other words, the marriage will automatically dissolved because if it is otherwise, would tantamount to illegal cohabitation (*zina*).

(2) However, in that sence, would s 44(2) of the Islamic Family Law Ordinance, 2001 ultra vires the personal law of Islam and/or the Federal Constitution?

(3) It is submitted that, the said provision does not contravene the personal law of Islam and/or the Federal Constitution for the said section merely provides for the confirmation by court.

(4) The requirement for the confirmation by court as provided in s 44(2) of the said Ordinance is only for the purpose of administration or regulation of the practice of Islamic personal law.

(5) In any event and if there is any lacuna, of which there is none here, the court shall refer to Islamic law as provided for in s 139(2) of the said Ordinance viz:

> Reference to Islamic law
>
> If the event of lacuna or where there is any matter which is not expressly provided for in this Ordinance or in any rules made under this Ordinance, the Shariah Court shall refer to Islamic Law.

(6) Islamic law would render such marriage dissolved but for the purpose of the said Ordinance, the Shariah Court is empowered to confirm such dissolution.

Question by court

(l) Who is to determine any provision of the shariah enactment/Ordinance is valid under the Federal Constitution?

Answer

(1) Item 4(k) of List 1 gives power to legislate to Parliament on matters to ascertain the Islamic law and other personal laws for purposes of federal law.

(2) In contrast, the state is empowered to legislate on matters of Islamic personal law provided under item 4(e)(ii) of List 1 and Item 1 of List II.

(3) In both respects, the determining authority as to the validity of any shariah legislation be it an Act passed by Parliament or an enactment/Ordinance passed by the State Legislature, can only be with the Federal Court.

(4) This issue has been answered by Abdul Hamid Mohamad CJ in the case of *Abdul Kahar bin Ahmad dan Kerajaan Negeri Selangor Darul Ehsan Permohonan* No 1 Tahun [2007], where in this case the court was posed with a question on whether the Federal Court or Shariah Court is seized with jurisdiction to decide whether the provisions of the State Enactments are in accordance with the provision of the Federal Constitution.

(5) The Federal Court referred to its judgment in *Latifah bte Mat Zin*, where at p 123, His Lordship said:

> Interpretation of the Federal Constitution is a matter for this court, not the Shariah Court.

(6) The Federal Court went on to say that, art 121(1A) of the Federal Constitution does not confer jurisdiction on Shariah Court to interpret the Constitution to the exclusion of the Federal Court.

(7) The court further held that art 128(1) which provides that:

> 128(1) The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction —
>
> (a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and
>
> clearly gives the effect that, it is the matter for the Federal Court and not the Shariah Court to decide whether the

impugned provisions are within the scope that the State Legislature has jurisdiction to make or not and whether they are valid or otherwise.

(8) See also ss 84 and 85 of Courts of Judicature Act 1964.

Question by court

(m) Is personal law restricted to the laws of the sects as well as *mazhab* and there can't be any regulatory measures to restrict the scope of personal law. If so, will it infringe the Federal Constitution?

Answer

(1) The answer to the first limb is in our view is in the affirmative, that is to say, Islamic personal law is restricted in reference to the laws of the sects as well as *mazhab*.

(2) On the regulatory measures of the second limb, the issue should not arise in respect of Injunction (*hukm*) which are clearly spelt out in the Qur'an and Sunnah. Other than those as aforesaid, the personal law may be restricted.

(3) In this regard, it is to note that s 39 of the Majlis Islam Sarawak Ordinance, 2001 provides that the Majlis shall ordinarily follow the accepted views (*qaul muktamad*) of the Mazhab Syafie but the Majlis is also empowered to follow the *qaul mukatamad* of the other mazhab if the situation so warrants ie it is not repugnant to the public interest, provided that special sanction of Yang di-Pertua Negeri is obtained.

(4) In other words, Majlis may follow any of the accepted views of the four *mazhabs*, if by doing so doesn't lead to a situation which is repugnant to the public interest.

(5) In the premises, the issue of infringement of the Federal Constitution in our view does not arise.

THE LAW

Islam and Federal Constitution

[12] Islam as everyone understands, is the religion of Muslims. The Holy Prophet had answered what Islam is, which is documented in authoritative text like *Sahih al-Bukhari* and *Sahih Muslim*. The learned author Sultan SM Darulssalam, Birmingham (2nd Ed, 2004) says:

In Shahih ul-Bukhari and Sahih Muslim there is a Hadith in which Jibrael appears before Allah's Massenger and asked about Islam saying: 'What is Islam'? Allah messenger said:

> Islam is to testify that there is no God to be worshipped but Allah and that Muhammad is the Messenger of Allah, to perform the prayers, to pay the Zakat, to fast in Ramadan, and to make the pilgrimage to the House (the Ka'bah in Makkah) if you are able to do so …

Imam Bukhari and Muslim also related on the authority of Abdullah bin Umar. Allah's Messenger said:

> Islam is built on five pillars: Testifying that there is no god but Allah and that Muhammad is the Messenger of Allah, performing prayers, paying the Zakat, fasting in the month of Ramadan and making pilgrimage (Hajj) to the House (the Ka'bah in Makkah), if you are able to do so.

However, the Federal Court in *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55 held:

(1) the term 'Islam' or 'Islamic religion' in art 3 of the Federal Constitution in the context means only such acts as relate to rituals and ceremonies;

(2) during the British colonial period, through their system of indirect rule and establishment of secular institutions, Islamic law was rendered isolated in a narrow confinement of the law of marriage, divorce and inheritance only. It is in this sense of dichotomy that the framers of the Constitution understood the meaning of the word 'Islam' in the context of art 3;

(3) it should thus appear that not much reliance can be placed on the wording of art 3 to sustain the submission that punishment of death for the offence of drug trafficking or any other offence will be void as being unconstitutional.

Tun Salleh Abas LP, inter alia, observed:

> In our view, it is in this sense of dichotomy that the framers of the Constitution understood the meaning of the word 'Islam' in the context of art 3. If it had been otherwise, there would have been another provision in the Constitution which would have the effect that any law contrary to the injunction of Islam will be void. Far from making such provision, art 162, on the other hand, purposely preserves the continuity of secular law prior to the Constitution, unless such law is contrary to the latter.
>
> It would thus appear that not much reliance can be placed on the wording of art 3 to sustain the submission that punishment of death for the offence of drug trafficking, or any other offence, will be void as being unconstitutional.

We, therefore, do not consider important to discuss cases cited by counsel on the question of death penalty being contrary to Islamic perception.

It is the contention of Mr Ramdas Tikamdas that because Islam is the religion of the Federation, the law passed by Parliament must be imbued with Islamic and religious principles and Mr Mura Raju, in addition, submitted that, because Shariah law is the existing law at the time of Merdeka, any law of general application in this country must conform to Shariah law. Needless to say that this submission, in our view, will be contrary to the constitutional and legal history of the Federation and also to the Civil Law Act which provides for the reception of English common law in this country.

A great deal of argument was spent to say that the law must be just, and the Proclamation of Independence was cited as an authority. There is of course no need for us to go further than to say that the standard of justice naturally varies from individual to individual; but the only yardstick that the court will have to accept, apart from our personal feelings, is the law that was legislated by Parliament.

We thank counsel for the efforts in making researches into the subject, which enabled them to put the submissions before us. We are particularly impressed in view of the fact they are not Muslims. However, we have to set aside our personal feelings because the law in this country is still what it is today, secular law, where morality not accepted by the law is not enjoying the status of law. Perhaps that argument should be addressed at other forums or at seminars and, perhaps, to politicians and Parliament. Until the law and the system is changed, we have no choice but to proceed as we are doing today.

It must be emphasised here that the Islamic jurisprudence and/or community will not accept any definition which has already been dealt with by the Holy Qur'an and/or the Holy Prophet. On the same note, there will be little resistance when, for the purpose of explaining the Quranic text or teachings of the Holy Prophet, jurists explaining in wider detail, provided it is strictly confined to the parameters of the said original source. For our purpose, the definition of Islam in the Federal Constitution can only be one as promulgated by the Holy Prophet which is simple and straight forward and will be understood by all persons and cannot be objectionable to any person because it is the faith of the Muslim community through out the world and the said five pillars are actually the pillars of Islam nothing more and nothing less. And those who subscribe to the five pillars are Muslims.

Islamic principles, law, madhabs and personal laws (bird's eye view)

[13] Islamic principles and law, divine in origin, has no race or language barrier. Islam being a universal religion imposes an obligation on Muslims to live within the precinct of Islamic Constitution as set out in the Holy Qur'an. No form of compromise can be recommended to a Muslim. Unlike other major religions, Islamic jurisprudence has developed an advanced legal code based on religious injunctions contained in the Holy Qur'an and the Sunnah. Al-Qur'an, (*ash-Sura*: 13) states:

> He had ordained (Sariah) for you that religion which the commanded unto Noah, and that We inspire in thee (Mohamed), and that which We commanded unto Abraham and Moses and Jesus.

Al-Qur'an, (*al-Jathiya*: 18) states:

> And now have we set thee [O Mohamed] on a clear road of (our) commandment (*shariatin-min-al-amr*); so follow it and follow not the whims of those who know not.

From the above verses, it is not difficult to appreciate the sentiments of the Muslim community for wanting to be ruled and governed by Islamic principles and law. It should be emphasised that Islamic law is only applicable to Muslims and not to others. It is common knowledge that the Holy Prophet had stated:

> leave alone the non-Muslims and whatever they believe in.

The Muslim jurists have classified the Islamic law under two heads: (i) Religious Law (*Tashriyi*) and (ii) Secular Law (*Ghair-tashri yi*). The purely religious part of the law forms Islamic personal law as stipulated by the Holy Qur'an and preaching and practice of the Holy Prophet and endorsed by the relevant Imams of the madhabs. The secular portion of the law (civil or criminal), which is a need and necessity for good governance of the country, is common to all nations and was never seen as a part of Islamic law or personal law of Muslims. In some Muslim countries, even the secular part is labelled as Islamic law, notwithstanding that it may not be part of the religious law. The secular part applies to all, Muslims and non-Muslims alike. The learned authors of *Fatawa-i-Alamgiri* observe:

> Non-Muslim subjects of a Muslim State are not subject to the laws of Islam.

To understand and appreciate Islamic jurisprudence one needs to have some knowledge in respect of the two main juristic schools of jurisprudence in Islam. They are the sunni school and the shia school. The sunni school has four main divisions called madhabs. They are Hanafi, Shafi, Hanbali and Maliki. It is said that about eighty percent of the total Muslim population of the world are sunni Muslims and the majority of them are Hanafis followed by Shafis. Iman Shafi founded the Shafi school and was well known for his progressive and modern views. Vast majority of the Muslims in Malaysia are Shafis.

According to sunni school, there are four chief sources of Islamic law. They are the Holy Qur'an, Ahadis and Sunnah, Ijma and Qias. The Holy Qur'an is the paramount source of Islamic law and expressed revelation of Allah. The Ahadis means what the Prophet said. The Sunnah means the physical deeds of the prophet. The Ahadis and Sunnah are regarded as the second most important source of Islamic jurisprudence after the Holy Qur'an. Ijma is the

consensus of the companions and followers of the Prophet ie, the agreement of the jurists among the followers of the Holy Prophet in a particular age on a particular question. Imam Shafi had rejected Ijma as the consensus of the scholars and reconstructed it as the consensus of the Muslim community. Qias is referred to as analogical deduction based on the sound reasoning from the sources of shariah law. Qias was applied when the three sources of shariah law namely, the Holy Qur'an, the Ahadis and Sunnah and Ijma could not adequately answer certain issues. There are other secondary and subsidiary sources of shariah law; however, those will not be mentioned here. Laws for good governance of the state were never advocated as personal law of the Muslims.

Personal laws

It must be emphasised here that during the early years of the religion of Islam, the primary source of Islamic jurisprudence was specifically confined to the Holy Qur'an, the teachings and practice of the Holy Prophet and thereafter the guidance shown by the companions of the Holy Prophet. Nearly two centuries later or so the juristic schools came into existence. Despite the juristic schools there are many Muslims who are not aligned to any of the madhabs. However, when reference is made to personal law of a Muslim, it extends only as much as to the original source and the development by application of Ijma or Qias etc by various madhabs. It does not extend to administrative laws or civil or criminal laws in practice in various Muslims states for the good governance of the country, even though it may have been under the guise of Shariah law.

Federal constitution and personal law of Muslim

It is trite that by virtue of art 3 of the Federal Constitution, Islam is the Religion of the Federation. And any Muslim, and/or what ever madhab he/she comes from, he/she is entitled to practice according to his/her madhab his/her personal law and this is protected by art 11(1) and (3) which says:

> (1) Every person has the right to profess and practice his religion and, subject to clause (4), to propagate it.
>
> (3) Every religious group has the right:
>
> (a) to manage its own religious affairs;
>
> (b) to establish and maintain institutions for religious or charitable purpose; and
>
> (c) to acquire and own property and hold and administer it in accordance with law.

Further, the reading of para 1 of list 2 Schedule 9 of the Federal Constitution only allows the state legislatures to enact Islamic law and personal and family law of persons professing Islam; and the provision therein to make procedure for Shariah Court can only relate to procedure relating to conduct of trial and not administrative procedures or restriction which are contrary to Islamic law or the personal law of Muslims or are not found in any madhabs. The said Schedule 9, reads as follows:

> Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons profesing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of Shariah Courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom.

Thus, it is clear from the above arts 3, 11(1), (3) and Schedule 9 of the Federal Constitution that there is total freedom to practice the religion of Islam and the state legislatures are restricted from regulating the practice of the religion of Islam in the original form.

An example of a provision of the state Shariah enactment which attempts to regulate the practice of the personal law of the Muslim is s 44(2) of the IFLO 2001, for the reasons which I had adumbrated earlier. The test for the validity of any provisions of the state Shariah ordinance of any state, pursuant to the schedule in my view is that whether the said provision is Islamic law or the personal law of the Muslim ie, at least one of the *madhabs*. This test is succinctly incorporated in all the state Shariah ordinances and in Sarawak IFLO 2001, s 2 states:

> 'Islamic Law' means Islamic Law according to Mazhab Syafie or according to one of the Mazhab Maliki, Hanbali or Hanafi as may be determined by the Majlis.

The same phrase with regard to Islamic law also appears in the Schedule 9. In essence, Islam is the religion of the Federation. The religion of Islam can be freely practiced and Schedule 9 does not permit the State Legislatures from enacting any laws which is not Islamic law or the personal law of the

Muslims. Having said that, parliament can make any law, civil and criminal, with provision for capital punishment for the Muslims or non-Muslims for good governance of the country. That is legitimate under the commands stated in the Holy Qur'an (*al-Nisaa*:59) but that does not make it Islamic law or personal law of Muslims. This distinction must be remembered. The founding fathers of the Constitution were fully aware of the Quranic injunction which permits parliament to enact laws for the good governance of the Nation and in consequence did not give the power or jurisdiction for state legislature to enact any law for good governance of Muslims other than strictly lslamic law and personal family law of persons professing the religion and to place proper procedural law for the hearing of disputes in Shariah Court and not to create administrative procedures, consent and/or penalty for its breach (see Schedule 9) in the pretext of good governance. Schedule 9, is very limited in scope and condoning its breach will be unconstitutional and will create much imbalance to the rights of the public as well as Administration of Justice as a whole, as has been evidenced by case laws. Support for the proposition that parliament can make laws for the good governance of the country and it is part of Islamic jurisprudence and is not in breach of art 3(1) of the Federal Constitution can be garnered from the commentary to the Qur'an (*al-Nisaa*:59) by the learned authors of the custodian of the two Holy Mosque which reads as follows:

> … those charged with authority or responsibility or decision, or the settlement of affairs. All ultimate authority rests in Allah. Prophets of Allah derive their authority from Him. As Islam makes no sharp division between sacred and secular affairs, it expects governments to be imbued with righteousness. Likewise Islam expects Muslims to respect the authority of such government for otherwise there can be no order or discipline.

On my part, I will say that it is disheartening to note that parliament has not enacted the respective laws for the good governance of the country to avoid, and/or to arrest the conflict of law situation in cases relating to conversion, notwithstanding the Quranic commands permit parliament to do so. Further, parliament is obliged under the constitution to ensure that Schedule 9 is not breached and if need be, to enact laws for the good governance of any member of the public.

[14] Islamic principles inclusive of law as promulgated by the Holy Qur'an, teaching and practice of the Holy Prophet applied by the companions of the Holy Prophet is well settled and properly documented and now easily accessible in almost all major languages. Further, text book writers have taken the liberty to expound and express them under various captions in systematic manner in reliance of well accepted authentic sources, with proper citation. Except, for obscure questions, which, in almost all cases will not have direct bearing to the Quranic commands in the literal sense, will often be taken as an issue of fundamental importance. They are often debated on, at times in

a vociferous manner with various views and opinions and divisions which is a common phenomenon in the Islamic academia and was never seen for a moment to be an obstacle to practise the religion of Islam as promulgated by the Qur'an, and the preaching and practice of the Holy Prophet. Criticism within and outside the Islamic academia on this obscure matter in my view, has given better opportunity to understand and appreciate the goodness of Islamic principles and values in the wider perspective. Support for my proposition and my judgment here can be found in a number of contemporary text books by distinguished scholars. Some of them, I have cited earlier.

[15] Having said the above, in my view, it will be dereliction of my duty as judge of the High Court of His Majesty to support any proposition that knowledge of Islamic principles and law lies with the Islamic courts or Islamic jurist only, since the religion of Islam is a universal religion. In consequence, the principles, practice and its jurisprudence are easily understandable by any literate person provided he ventures into reading the text and materials on the subject matter. And all His Majesty's judges are equally competent to deal with the matter. This statement is well evidenced by various scholarly texts written on Islamic Jurisprudence by non-Muslims, and various judgments by the Privy Council, etc with the bench consisting of non-Muslims. (see BR Verma's *Islamic Law — Personal*, 6th Ed, 1991). The scholarly texts such as the *Hedaya* and various judgments have been well received by the Muslim community. Having said that, in view of art 121(1A) of the Federal Constitution, the civil court will decline to entertain matters relating to personal law of born Muslims, being the disputing litigants, for reason stated earlier. In addition, it must also be emphasised here that it is wrong to assume that essentially Islamic jurist or lawyer trained purely in the secular law can confront issues relating to Islam as it needs a fair appreciation of the Federal Constitution and the related principles, since the dominant foundation of public's right is encapsulated in the Federal Constitution. When the issue is only in relation to simply the personal law of the Muslims and which is not in any way related to the validity of any of the provision of Shariah state ordinance and/or direct interest of non-Muslim, it is trite that the right forum under the Federal Constitution is the Shariah Court.

[16] I have read the submissions of the parties in detail and it is my judgment that:

(a) the Shariah Court is the right forum to hear dispute relating to born Muslims regarding the personal law of Muslims, under art 121(1A) of the Federal Constitution. However, with regard to issues relating to converts and third parties in consequence of the conversion, the civil court may have jurisdiction as such matters are not specifically prohibited by art 121(1A) of the Federal Constitution.

A (b) as the petitioner is not a born Muslim, under the Islamic personal law, there is no prohibition for the petitioner to appear before the civil court to settle his obligations and/or liabilities as required by the law which he himself has previously subscribed to by contracting a civil marriage under LRA 1976. Islamic Jurisprudence has never been an obstacle for
B Muslims to fulfil legal requirement and/or equitable or ethical requirement of the law of the country or for that matter, for the purpose of civil law of marriage the contractual commitment of the convert. [see al-Qur'an (*al-Maida*:1); (*al-Nisaa*: 59)].

C **[17]** For reasons stated above, it is my judgment that the court has jurisdiction to hear this matter provided:

(a) the petitioner amends the petition to include a prayer seeking a declaration that the marriage has been dissolved as a result of
D conversion, as a procedural device to invoke the court's jurisdiction. And this is necessary despite the fact that it is not necessary under his personal law, and such a procedural step would be seen to be independent of LRA 1976 and will not be seen as an infringement of any of the provisions of the said Act.

E (b) to display by way of affidavit, by at least obtaining a letter from the relevant authorities or religious department, proof of conversion, to confirm conversion on the facts of this case.

I hereby order so.

F *Order accordingly.*

Reported by K Nesan

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